

Newsletter n°31/2016

The Filtering of Appeals to Supreme Court

Editorial

President Susan Denham

It was with great pleasure that I welcomed the Members and Observers of the Network to Dublin for a conference of the Network on 26th and 27th November, 2015. The conference dealt with the important topics of 'The Relationship between the National Courts and the European Court of Human Rights' and 'The Filtering of Appeals to the Supreme Courts'. Chevalier Jean de Coadt, First President of the *Cour de Cassation* of Belgium, presented an Introductory Report on the first theme. Mr. Rimvydas Norkus, President of the Supreme Court of Lithuania, presented a report on the second topic, which he prepared on the basis of responses from the Members of the Network to a questionnaire which had been circulated to Members on the filtering of appeals to the Supreme Courts. The presentation of both reports was followed by a *tour de table*, during which each President discussed the position in their State in respect of each topic.

The attendance at the conference of a majority of Members and Observers, and the roundtable format of the meeting, resulted in a very high level of engagement and a useful and constructive discussion of the issues. This was greatly facilitated by the high quality of the reports presented at the conference.

We intend to build on our fruitful discussions in Dublin by organising a meeting between the Network and the ECtHR in June 2016, and plans for such a meeting are currently in progress.

On 27th January I attended a meeting on behalf of the Network with Mrs. Věra Jourová, EU Commissioner for Justice, Consumers and Gender Equality at the European Commission Headquarters in Brussels, where we discussed issues of importance in the Justice area. The Network looks forward to continued dialogue with the EU Commission.

The Network is indebted to Mrs. Pauliine Koskelo, former President of the Supreme Court of Finland, for her dedication for so many years to the development of our Network. We congratulate her on her appointment as Judge of the European Court of Human Rights and wish her every success in her role.

We are also grateful to Mr. Giorgio Santacroce, former First President of the Supreme Court of Cassation of Italy, for his immense contribution to the Network. In particular, we thank him for organising the last Colloquium of our Network in Rome in June 2014, which was a great success.

The Network is very pleased to welcome our new Members of the Network, Mr. Tim Esko, President of the Supreme Court of Finland, and Mr. Giovanni Canzio, First President of the Supreme Court of Cassation of Italy. We also welcome our new Observer of the Network, Mrs Toril Marie Øie, Chief Justice of the Supreme Court of Norway.

First President Jean de Coadt and President Rimvydas Norkus have agreed to join the Board of the Network, and we look forward to their valued input in the organisation and management of Network matters.

The Filtering of Appeals to Supreme Court

In his Introductory Report, after defining the nature of the appeal and explaining the reasons for filtering appeals, President Rimvydas Norkus describes filtering mechanisms and identifies models from the replies to a questionnaire prepared beforehand and circulated to the Members of the Network. Some excerpts from his report are reproduced below.

The **first model** can be called the *leave-to-appeal* system. The United Kingdom, Ireland, Norway, Denmark, Sweden are principle examples of this kind of filtration. The cases to be heard and adjudicated before the Supreme Court are pre-selected (selection 'at the door?') on the basis of quite abstract criteria, emphasizing public purposes of the Supreme Court, for example, the decision involves a matter of general importance or in the interests of justice it is necessary that there be an appeal to the Supreme Court. These criteria give much discretion into the hands of those who decide on whether to select a case. This power is usually vested in the Supreme Court itself, sometimes also to the lower courts of appeals. In Denmark cases are selected by Appeals Permission Board, consisting of a Supreme Court Judge, a High Court Judge, a District Court Judge, a lawyer and a Professor of Law. It is also worth mentioning that there is no separate Constitutional Court in these countries. Under 'the leave to appeal' mechanism usually there is no requirement of mandatory representation before the Supreme Court; the latter can deal both with the questions of law and fact; the selection criteria often are alike for criminal and civil cases; likely unlawfulness of the appealed decision as a general rule does not play a major role in a selection process.

The **second model** is characterized by the feature that there is *no judicial filtration stricto sensu*. France, Belgium, Netherlands, Greece, Italy are primary examples of it. These jurisdictions have their own methods how to manage workload of the Supreme Court. It is performed by two basic means. The first is private, *extra-judicial*. The cassation appeal to the Supreme Court in some categories of cases can be brought only by a special lawyer assigned to the Supreme Court or who fulfils certain requirements of experience. Therefore, it is in principle incumbent on practising lawyers to advice their clients on the chances of success and thus to filter wholly unfounded appeals to the Supreme Court. This seems to reflect an idea that Justice is a matter of many people who are or can be interactively involved in proceedings. Everybody has to share the duty to contribute to appropriateness of its functioning. Cooperation between the parties and courts and a joint responsibility is needed.

All means of managing workload of the Supreme Court employed under 'no judicial filtration' system can differ depending on a category of a case (civil, criminal, tax, etc.). Under this model efficiency of the system and probably the Supreme Court's work altogether very much depends on particular features and synergic effect of combining aforementioned methods and their application in practice. For example, number of lawyers who can bring a case before the Supreme Court is very important. Private players indeed have some power to dictate the workload of the Supreme Court. The legislation can even grant them a right to ask for an oral hearing of a case that is supposed to be dealt with in a summary (simplified) manner. On the other hand, judges can also be creative and invent additional methods of reducing workload, for example, by very formally applying certain statutory requirements and limitations. In order to limit workload statutory rules may be implemented to such an extent that, for example, questions which are deemed issues of law in other jurisdictions may be regarded as questions of fact and thus not falling within the jurisdiction of the Supreme Court in these ones. In general, number of cases that the Supreme Court has to decide quite significantly depends on the size of population of a country at hand and can reach thousands or tens of thousands of new cases per year to be decided by few hundred or more judges.

The **third model** can be described as *mixed* one, having some features of both models indicated above, and sometimes shifting more to the leave to appeal or no judicial filtration system. It is difficult to indicate primary example of this model, but Lithuania can be attributed to it. There may be different variations of the mixed system. For example, sworn advocates are required, no special case selection / admissibility panel is created, the procedure of selecting a case is adversarial and the other parties may submit their written responses, leave to appeal is granted by an appellate court, the law may state certain amount in controversy above which appeal to Supreme Court is always granted, more impetus is given on an importance of a case for uniform interpretation of a law, etc. Still the most common feature of this model is

that there are certain grounds, some of them often relating to a general importance of a case (such as uniformity of jurisprudence, development of law), laid by a legislator, which appeal to Supreme Court have to comply with in order to be admitted or selected for a full examination and adjudication. If an appeal does not satisfy these grounds, it is held not admissible or is dismissed at the very beginning of an appeal procedure or later, after more thorough examination of it, usually without providing an extensive reasoning, just giving brief motivation.

In countries where case selection criteria combine both general importance of a case and likely unlawfulness of an appealed judgment we can face a different issue of reasoning the decision refusing to admit an appeal. If a court does not precisely indicate the reasons for not selecting / accepting case, an appellant may be left wondering in uncertainty why her/his appeal has not been admitted ? she/he has not succeeded raising an important question of law, an appealed judgment is simply correct, or both. Of course, after all, we can ask, if one cannot trust the Supreme Court's judgment in deciding what to decide, how can she/he trust its judgment in deciding what it has decided to decide? But isn't it that we, judges of Supreme Courts, have to build this trust?

Attached file:

[Newsletter n°31/2016.pdf](#)^[1]

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